INDEX

	Page
Opinions below	1
Jurisdiction	2
Statutes involved	2
Questions presented	2
Statement	3
Summary of argument	9
Argument	12
I. The transportation is not within the commercial-zone exemption	13
II. The Commission was not required to refer the investigation to a joint board	26
III. The order is not unlawful because it relates in part to the electric lines of the Transit Company	29
IV. The order is not unlawful as a prescription of commutation fares	38
V. The rates prescribed are not arbitrary or confiscatory	42
Conclusion	49
Appendix	50

CITATIONS

Cases:	
Arizona Grocery Company v. *Atchison, T. & S. F. Ry.*, 284 U. S. 370	44
Arkadelphia Co. v. *St. Louis S. W. Ry. Co.*, 249 U. S. 134	41
Baltimore & Ohio S. W. R. R. Co. v. *Settle*, 260 U. S. 166	37
California v. *United States*, 320 U. S. 577	34, 36
City of Yonkers v. *United States*, 320 U. S. 685	7
Georgia Pub. Serv. Comm'n v. *United States*, 283 U. S. 765	44
Houston & Texas Ry. v. *United States*, 234 U. S. 342	34, 41
Illinois Commerce Comm'n v. *United States*, 292 U. S. 474	44
Interstate Railway Co. v. *Massachusetts*, 207 U. S. 79	41
Lake Shore & Michigan Southern Railway Co. v. *Smith*, 173 U. S. 684	40
3 M. C. C. 234	14
Nashville, C. & St. L. Ry. Co. v. *Tennessee*, 262 U. S. 318	39, 40
Northern Pacific Railway v. *North Dakota*, 236 U. S. 585	45
Piedmont & No. Ry. v. *Interstate Commerce Comm'n*, 286 U. S. 299	21
St. Joseph Stock Yards Co. v. *United States*, 298 U. S. 38	49

Cases—Continued. Page

St. Louis Southwestern Ry. Co. v. *United States*, 245 U. S. 136 37
Schiverling, Common Carrier Application, 4 M. C. C. 141 20
Thomson v. *United States*, 321 U. S. 19 30
Through Routes and Through Rates, 12 I. C. C. 163 37
United States v. *New York Central R. R.*, 272 U. S. 457 36
United States v. *New York Central Railroad*, 263 U. S. 603 42
United States v. *Pennsylvania R. R.*, Nos. 47 and 48, present Term 34
United States v. *Village of Hubbard*, 266 U. S. 474 ..... 30, 31
Wisconsin R. R. Comm. v. *Chicago, B. & Q. R. R. Co.*, 257 U. S. 563 ..... 34, 37

Constitution:
Fourteenth Amendment 41

Statute:
Interstate Commerce Act:
National transportation policy 22, 56
Sec. 22 ..... 11, 38, 39, 40, 57
The Motor Carrier Act, 1935, c. 498, 49 Stat. 543, as amended:
Sec. 203 (a) (14) 30, 50
Sec. 203 (a) (16) 50
Sec. 203 (b) 9, 10, 13, 22, 50
Sec. 203 (b) (8) 2, 13
Sec. 205 (a) 3, 10, 13, 26, 51
Sec. 216 (a) 53
Sec. 216 (c) 53
Sec. 216 (e) 32, 36, 54
Sec. 216 (f) 55
Sec. 217 (b) 38

Miscellaneous:
Blanning Report (prepared by the Director of the Bureau of Motor Carriers of the I. C. C. for a committee of the Office of Defense Transportation) 42
79 Cong. Rec. 5651 21
79 Cong. Rec. 5655, 5670 31
Hearings before the Senate Committee on Interstate Commerce on S. 1629, S. 1632 and S. 1635, pp. 208–216, 217–218 ..... 19, 20
Hearings before the Subcommittee of the House Committee on Interstate and Foreign Commerce, 74th Cong., 1st sess., on H. R. 5262 and H. R. 6016, pp. 82–90, 92–93 ..... 19, 20
Rules of the Interstate Commerce Commission:
Rule 5 28
Rule 26 29
2 Sharfman, *The Interstate Commerce Commission* (1931), pp. 15–17 31
S. Rep. 482, 74th Cong., 1st sess., p. 2 30

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 663

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

CAPITAL TRANSIT COMPANY, ALEXANDRIA, BARCROFT AND WASHINGTON TRANSIT COMPANY, ARLINGTON AND FAIRFAX MOTOR TRANSPORTATION COMPANY, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The original report of the Commission (R. 835–857) is reported in 256 I. C. C. 769. The supplemental report of the Commission (R. 813–827) is reported in 258 I. C. C. 559. The first opinion of the District Court (R. 912–921) is reported in 55 F. Supp. 51. The second opinion of the District Court, together with the dissenting opinion (R. 943–949) is reported in 56 F. Supp. 670.

JURISDICTION

The final decree of the District Court (R. 952–953) was entered September 20, 1944, and the appeal was allowed the same day. (R. 954.) Probable jurisdiction was noted December 11, 1944. The Court's jurisdiction rests on the Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 210, 219; 28 U. S. C., secs. 45 and 47a) and section 238 of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936, 938, par. (4), 28 U. S. C., sec. 345).

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in the Appendix, *infra*, p. 50 *et seq.*

QUESTIONS PRESENTED

1. Whether the Commission properly held that the interstate transportation here involved was taken outside the commercial-zone exemption in Section 203 (b) (8) of the Motor Carrier Act, either because the carriers are not engaged in intrastate transportation over the entire length of the interstate routes or because jurisdiction is required to carry out the national transportation policy.

The foregoing question, decided adversely to the Commission by the court below, is the only one passed on by the majority of that court. The following additional questions raise issues argued in

the court below and presumably to be presented here by appellees in support of the judgment.

2. Whether the Commission was required to convene a Joint Board to conduct the investigation into the reasonableness and lawfulness of the fares of appellees, under Section 205 (a) of the Motor Carrier Act.

3. Whether the order of the Commission was beyond its jurisdiction to the extent that it applies to the electric railway operations of the Transit Company in conjunction with the bus operations of that company.

4. Whether the order of the Commission prescribes commutation fares, and, if so, whether such an order is beyond the authority of the Commission.

5. Whether the maximum fares prescribed are unreasonable or confiscatory.

STATEMENT

This proceeding was instituted by the Interstate Commerce Commission as an investigation into the reasonableness and lawfulness of certain fares of the five appellee motor carriers.[1] The fares in question relate to the transportation of passengers between points in the District of Col-

[1] The Capital Transit Co., the Alexandria, Barcroft and Washington Transit Co., the Arlington and Fairfax Motor Transportation Co., and the Washington, Virginia & Maryland Coach Co., hereinafter referred to as the Transit Company, the Alexandria Line, the Arlington Line, and the Coach Company, respectively.

umbia and points on the Virginia side of the Potomac River to certain Military and Naval headquarters: the Pentagon Building, the Navy Arlington Annex, the Army Air Force Annex at Gravelly Point, and the Washington National Airport. The investigation was an outgrowth of persistent efforts by the War and Navy Departments to secure a reduction in fare for the employees traveling between the District and the Virginia installations. These efforts reached a stage at which the carriers agreed to adopt recommendations made unofficially by a committee of the Office of Defense Transportation, but the recommendations were unacceptable to the War Department because, as stated by Secretary Stimson in a letter to Chairman Alldredge of the Commission, the proposals "will probably result in increased cost of transportation, or at best would bring about negligible savings to them [employees]." (Ex. 5, not printed; see also R. 570–572; Exs. 57–59, R. 998–1014, 177–180.)[2]

The total number of persons employed at the Virginia installations is over 40,000, including about 30,000 at the Pentagon. Somewhat less than half of these reside in the District and travel to and from work each day. The number of passenger trips to or from the District to the Virginia installations is over 31,000 per day (Ex. 15,

[2] The recommendations contemplated a fare of 13⅓ cents for the through transportation between any point in the District and the Virginia installations. See p. 42, *infra*.

R. 961; R. 839–840).[3] The Transit Company operates only rush-hour service between the District and the Pentagon, in the morning and in the afternoon. The Virginia Lines operate between terminals in the downtown section of the District and points in Virginia. All the appellees serve the Pentagon. The Alexandria Line serves the Navy Annex, Army Annex, and Airport as well. The Arlington Line serves the Navy Annex, in addition to the Pentagon. The Coach Company serves only the Pentagon, and its service is irregular. (R. 837–838.) The distances between the Virgina installations and the District terminals are shown in Exhibit 12 (R. 960), as well as the distances to the Virginia installations from representative points in the District. The Pentagon, for example, is 3.5 and 3.6 miles from the two Transit Company terminals, respectively, and from 3.6 to 5.2 miles from terminals of the other companies.

The existing pattern of fares is complex. The Transit Company charges 5 cents for the trans-Potomac trip on its Pentagon buses on one route, and on the other it charges 5 cents in addition to a transfer from one of the District Lines, on which the fare is 10 cents in cash, or three tokens for 25 cents, or an unlimited weekly pass costing $1.25. The Virginia Lines charge, in general, a one-way fare of 10 cents. However, the Alex-

[3] The figures in Exhibit 15 represent an actual traffic count made during a 24-hour period in August 1943 (see R. 49–50).

andria Line offers a book of 26 tickets at 7.5 cents each for service between the District and the Army Annex, and both the Alexandria and the Arlington Lines have a 5-cent fare between the Memorial Bridge and Navy Annex (R. 838–839). Thus a passenger using a District bus or streetcar of the Transit Company and a trans-Potomac bus of the Transit Company or one of the Virginia Lines pays a total fare which consists of the District fare plus either 10 cents, 7.5 cents, or 5 cents. There are no transfer privileges between the Transit Company and the Virginia Lines.

After extensive hearings, the Commission prescribed maximum fares as follows: (a) The Transit Company is required to charge its District fares for the Pentagon service, including service on its District buses or streetcars in combination with its trans-Potomac service to the Pentagon. To the extent that its existing fares are less (in the case of an independent trans-Potomac trip over one of its routes at 5 cents), the fares may be raised to the prescribed maximum. (b) The Virginia Lines are required to establish a maximum fare of 10 cents per single trip or three tokens for 25 cents, for trips solely on their lines. To the extent that their existing fares are lower, they may be raised to that level. (c) In addition, the Commission required a maximum joint fare for trips utilizing both the Transit Company and the Virginia Line facilities. This maximum joint fare was fixed at 12 trips for

$1.60, equal to 13⅓ cents per trip (R. 850–851, 857).

The appellees filed complaints in the District Court to set aside the Commission's order, alleging that the Commission lacked jurisdiction and that the order was unreasonable and confiscatory (R. 828–890). The District Court set aside and enjoined the order on the ground that the transportation involved fell within the so-called commercial-zone exemption of Section 203 (b)(8) of the Motor Carrier Act, and that it was not removed from the exemption under the terms of that section, as the Commission had held, by reason of the fact (a) that the carriers were not engaged in intrastate operation over the entire length of the interstate routes, or (b) that jurisdiction was required to carry out the national transportation policy. The court, relying on *City of Yonkers* v. *United States*, 320 U. S. 685, held that the Commission's conclusion with respect to the national transportation policy was not supported by adequate findings (R. 913–921).

The Commission thereupon ordered the proceeding reopened for further hearing and consideration, on the jurisdictional issues ruled on by the District Court (R. 772–775). The appellees objected to any reopening on the ground that the issues were *res judicata* and that the Commission had been held to be without jurisdiction (R. 774, 777–778). The Commission received additional evidence, as a foundation for further find-

ings, on the importance of the military and naval installations from the standpoint of the conduct of the war (R. 794–804). The Commission also received copies of orders of the District Public Utilities Commission describing the transportation privileges within the District of each of the Virginia Lines (R. 781; Exs. 107–109, R. 1049–1064). These exhibits confirm the fact that the Coach Company performs no intrastate service in the District, and that the other two Virginia Lines perform none on the Memorial Bridge route, and on the Highway Bridge route may receive passengers on inbound trips and discharge passengers on outbound trips within the District only at the stops at Jefferson Memorial (R. 1051, 1054). The Commission filed a supplementary report, making detailed findings on the jurisdictional issues, and discussing also the question, raised in a dissenting opinion in the original report, whether the fares were in any sense commutation fares and, if so, whether the Commission was empowered to prescribe them. The Commission adhered to its earlier order. (R. 813–827.)

The appellees moved in the District Court that the prior decree of injunction be made to include the supplemental order of the Commission, or that an additional decree to that effect be entered. (R. 923–927.) The Commission filed an answer to the motion, asserting that its subsequent proceedings were responsive to, and not in violation of, the decree of the court. (R. 929–933.) The

United States moved in the District Court for a new trial and new judgment dismissing the complaints, in the light of the Commission's supplemental report and finding, and also filed a memorandum in opposition to the motion of the appellees (R. 939–941, 933–939). The District Court, after argument on the motions of appellees and of the United States, entered a decree setting aside and permanently enjoining the supplemental order of the Commission. The majority of the Court adhered to its previous opinion with respect to the "entire length" proviso of the commercial-zone exemption, and held further that the findings of the Commission regarding the necessity of removing the commercial-zone exemption to promote the national transportation policy were not supported by the evidence. (R. 942–945.) Mr. Justice Arnold delivered a dissenting opinion sustaining the jurisdiction of the Commission and upholding the order as against the objections raised by appellees on the merits (R. 945–949).

SUMMARY OF ARGUMENT

1. The Commission properly held that the interstate transportation for which it prescribed maximum rates is not within the commercial-zone exemption of Section 203 (b) of the Motor Carrier Act. In the first place, that exemption applies only where the carrier of passengers is en-

gaged in intrastate transportation over the entire length of the interstate route; here one of the carriers performs no intrastate transportation in Virginia, one performs none in the District of Columbia, and the other two perform only negligible intrastate transportation in the District. Secondly, the Commission properly concluded that the exemption should be removed in any event because jurisdiction over the reasonableness of fares is necessary to carry out the national transportation policy, and by Section 203 (b) this necessity is made an express ground of removal from the exemption. Reasonable fares for mass transportation to the national headquarters of our military and naval establishments are, as the War and Navy Departments and the Commission have recognized, within the purview of the national transportation policy, one of the declared objects of which is to maintain a transportation system adequate for the needs of national defense.

2. The Commission did not err in declining to refer the investigation to a Joint Board under Section 205 (a) of the Act. Such a reference is mandatory in the case of a complaint involving three states or less; but the present proceeding was not heard upon complaint but upon an investigation by the Commission on its own motion, albeit at the request of the Secretary of War.

3. The Commission did not violate any provisions of the Act in making its order applicable to the electric street railway service of the Transit

Company insofar as that service is interchangeable with the company's bus service. The order prescribes maximum joint rates between the Virginia Lines, which are exclusively motor carriers, and the bus lines of the Transit Company; as an incident of the order, it was proper to require that the ordinary interchange between bus and streetcar service of the Transit Company be maintained in relation to the joint fares.

4. The fares prescribed are not commutation fares. While they permit the sale of tokens, and require the sale of multiple-trip tokens or tickets for the joint fares, these are the normal and predominating fares for the respective transportation services and are not in the nature of reduced fares for a special class of suburban or interurban traffic, as would be characteristic of commutation fares. Moreover, the Commission does not lack power to establish commutation fares. Section 22 of the Act merely provides that nothing in the statute shall prevent carriers from establishing commutation fares. This provision gives assurance that such fares are not discriminatory *per se;* it does not preclude the Commission, in the first instance, from finding that commutation fares should be established as part of a reasonable schedule of rates.

5. The fares prescribed are not unreasonable or confiscatory. While they reflect a differential in rates between the unitary transportation of the

Transit Company and the interline transportation of that company in conjunction with the Virginia Lines, such a differential previously existed, it is not uncommon, and it is not complained of here by passengers. In making the District of Columbia zone fare of the Transit Company applicable to its single-line transportation service to the Pentagon, the Commission acted on ample evidence that such treatment was reasonable in view of the relative distances involved and the character of the transportation as mass urban service. Only the Transit Company introduced cost evidence, and this fails to show that for the entire transportation between points of origin in the District and the Virginia installations the rates are not compensatory. Furthermore, certain of the existing rates may be increased under the order; and divisions of the joint rates have not been prescribed, and on no basis can they be assumed to be other than amply compensatory.

ARGUMENT

The order of the Commission covers only interstate rates. No question of constitutional authority is presented, and indeed if the Commission has no jurisdiction, the rates are not within the jurisdiction of any regulatory authority. These considerations are of major significance in approaching the various objections raised by the appellees in the court below to the authority of the Commission.

Certain of the objections go to the entire order—that the transportation is exempted by the "commercial zone" provision in Section 203 (b) (8) of the Interstate Commerce Act, and that a joint Board should have been convened pursuant to Section 205 (a) of the Act. Other objections go to particular aspects of the order—that it unlawfully requires the Virginia lines to establish joint fares with an electric railway system; that it unlawfully prescribes commutation tickets; that the extension of the District fare to the Pentagon operations of the Transit Company is unreasonable and confiscatory. Only the issue of the commercial-zone exemption was passed on by the court below. Because of the importance of a prompt decision of the whole case, if the benefit of the rate order is to be made effective, and because the questions raised below by the appellees are dependent on issues of law, we shall not confine our discussion to the single question decided by the District Court.

I

The transportation is not within the commercial-zone exemption

The so-called commercial-zone exemption is contained in the following portions of Section 203 (b) of the Interstate Commerce Act, as added by the Motor Carrier Act of 1935:

> (b) Nothing in this part, * * * shall be construed to include * * * (7a) the

transportation of persons or property by motor vehicle when incidental to transportation by aircraft *nor, unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the national transportation policy declared in this Act,* shall the provisions of this part * * * apply to: (8) The transportation of passengers or property in interstate or foreign commerce wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities * * * *provided that* the motor carrier engaged in such transportation of passengers over regular or irregular route or routes in interstate commerce *is also lawfully engaged in the intrastate transportation of passengers over the entire length of such interstate route or routes in accordance with the laws of each State having jurisdiction;* * * *.* [Italics supplied.]

The routes here involved are within the Washington, D. C., commercial zone as heretofore defined by the Commission. See 3 M. C. C. 243. The Commission based its jurisdiction upon each of the two provisions which are exclusions from the commercial-zone exemption, and which are italicized in the quotation above: (a) the provision relating to the national transportation policy, and (b) that relating to to the "entire length" of the

interstate route. In the court below, Justice Arnold agreed with the Commission's conclusion as to both grounds of exclusion. The majority of the court, however, rejected both grounds, as indeed it is necessary to do if the order is to be set aside under the commercial-zone clause. We submit that the order can be supported on the basis of either ground taken by the Commission.

1. In view of the concessions made on the record, as well as the undisputed facts, the holding of the court below that all of the appellees satisfied the proviso regarding intrastate transportation over the "entire length" of their interstate routes is hardly understandable. Counsel for the Capital Line and for the Alexandria Line stated at the outset of the Commission hearing that the Commission had jurisdiction (R. 5–6). Counsel for each of these lines repeated the assertion during the argument at the close of the hearing (R. 701, 719). The president of the Capital Line testified that it had no intrastate rights in Virginia (R. 188). A third appellee, the Coach Company, has no intrastate rights in the District, as its general manager testified (R. 443). In its first opinion the Commission ruled that as to the Transit Company and the Coach Company, "there is no doubt that we have jurisdiction because one does not perform intrastate transportation in Virginia and the other does not perform it in the District" (R. 843). As to the Arlington and Alexandria Lines, the Commission concluded that

since they perform restricted intrastate transportation in the District, it is "reasonably clear" that their fares between the District and the Virginia installations are subject to the Commission's jurisdiction (*ibid.*)

The District Court, in its first opinion, overturned the Commission's conclusion with respect to each carrier, upon reasoning which is by no means clear, but which seems to proceed upon the dual misconception that "the transportation from the Virginia line to the Pentagon is intrastate", and that the segment of the interstate transportation in the District of Columbia is regulated by the Utilities Commission of the District (R. 915): When the record again came before the Commission, opportunity was taken to set forth the facts in greater detail, and the pertinent orders of the District of Columbia Utilities Commission were received in evidence, confirming the fact that the Coach Company had no intrastate rights in the District and that the other two Virginia Lines had very limited rights of that character (R. 1049–1064).

In its second opinion, the Commission carefully recited the pertinent facts (R. 820–822). It pointed to the testimony of the president of the Transit Company and to the company's tariffs, showing that it is not engaged in intrastate transportation in Virginia. Applications to the Commission for authority to operate between the District and the Pentagon contained assur-

ances that the Transit Company has no operating rights for intrastate transportation in Virginia. As to the Coach Company, the Commission pointed to the orders of the District Commission, which authorized no intra-District transportation. As to the Alexandria and Arlington Lines, the Commission observed that over the Memorial Bridge route they are not authorized to engage in any intra-District transportation, while over the Highway Bridge route they are authorized to engage in such transportation only to a very limited extent, picking up and discharging District passengers south of Maine Avenue opposite the Jefferson Memorial, but having no authority to engage in intra-District transportation in the area north of Maine Avenue to their terminals in the District. (R. 822; see R. 1051, 1054.) The Commission also noted that in numerous proceedings under the Motor Carrier Act, the Virginia Lines have applied for and received various authorizations from the Commission, on the assumption that the Commission had jurisdiction, and these proceedings were subsequent to the establishment of the Washington, D. C., commercial zone (R. 822). Nevertheless, the court below in its second opinion, without added discussion, adhered to its view that none of the appellees was taken out of the commercial-zone exemption by reason of absence of lawful intrastate transportation over their entire interstate route (R. 944).

It seems to us plain beyond debate that the Transit Company and the Coach Line are outside the commercial-zone exemption, and as to them the proviso regarding intrastate operations over the entire length of the route presents no question of statutory construction. It is only as to the Alexandria and Arlington Lines that a question of interpretation can be raised. The Commission stressed the requirement that a carrier must be engaged in intrastate transportation over the "entire length" of its interstate route if it is to be exempted; the argument to the contrary minimizes this requirement and stresses instead the mere requirement that the carrier be "lawfully" engaged in intrastate transportation over the route.

We submit that the Commission's construction is supported by the terms of the proviso and by consideration of its purpose. That purpose was to bring within federal authority interstate bus transportation, even though within a municipality or commercial zone, unless the entire route enjoys lawful local service by the carrier and the route is fortuitously intersected by an interstate line. As originally drawn, the bill contained an outright exemption for commercial-zone transportation of property and persons in interstate commerce. The qualification now contained in the proviso was inserted at the instance of representatives of the National Association of Motor Bus Operators and Public Service Coordinated Transport of New Jersey. See Hearings before

the Subcommittee of Committee on Interstate and Foreign Commerce, House of Representatives, 74th Cong., 1st sess., on H. R. 5262 and H. R. 6016, pp. 82–90, 92–93; Hearings before the Committee on Interstate Commerce, U. S. Senate, 74th Cong., 1st sess., on S. 1629, 1632, and 1635, pp. 208–216, 217–218. The proviso as it now appears was presented by these spokesmen. They pointed out that under the outright exemption in the original bill, important interstate bus transportation might go unregulated. Examples which were suggested included commercial zone transportation in areas surrounding Washington, Chicago, Minneapolis, St. Paul, Cincinnati, and Omaha (House Hearings, p. 86; Senate Hearings, p. 214). When it was suggested in the House hearings by a member of the committee that the commercial-zone exemption should perhaps be eliminated, it was pointed out that with respect to freight there was no objection to the exemption, and with respect to passengers its total elimination would be objectionable from the standpoint of "certain other sections of the country—notably, Kansas City—where street-car lines are operated on both sides of the State line, and they are substituting buses, and those buses are regulated by the States, in which they are operated by both States, and those companies do not desire to come within the provisions of this bill." The spokesman added: "I will present an amendment in a

moment to you which will fix the matter as we think it should be written." (House Hearings, at 84–85.) It is this amendment which is now the proviso in question. In the Senate committee a similar discussion occurred. To the suggestion that no passenger transportation be exempted under the commercial-zone provision, the spokesman replied: "While the amendment suggested by the chairman was the amendment I first intended to suggest, I have been informed there are situations with respect to the carrying of passengers where some exception might well be made. I refer particularly to Kansas City. * * * Therefore the amendment I am going to present to you will exclude such operations from the bill, in metropolitan areas as well as the transportation of property." Senate Hearings, p. 212. The proviso as it now appears was then presented. *Id.*, 214.

The proviso has been interpreted by the Commission in the light of its obvious purpose, to limit the exemption to only those carriers which are performing essentially local bus service on both sides of a state line which happens to divide a community or commercial zone.[4] This approach

[4] In an early decision under the Motor Carrier Act the Commission had announced a similar construction of the proviso, though the expression was not necessary to the decision, since the carrier having only limited intrastate rights in one state had none in the other. *Schwerling Common Carrier Application*, 4 M. C. C. 141.

is particularly appropriate in construing an exemption from the remedial provisions of the Act. *Piedmont & No. Ry.* v. *Interstate Commerce Comm'n*, 286 U. S. 299, 311–312. In view of the almost negligible intrastate rights enjoyed by the Alexandria and Arlington Lines within the District, we submit that the Commission's conclusion as to them is in harmony with the terms and spirit of the proviso and in no event can be said to be erroneous.[5]

2. The second ground for removal of the appellees from the commercial-zone exemption, that relating to the necessity of jurisdiction to carry out the national transportation policy, is fully discussed in the Commission's second opinion, in response to the holding of the District Court that

---

[5] In explaining the bill to the Senate, Senator Wheeler stressed the purpose of the exemption "to avoid duplication of regulation over bus operations, such as those conducted by street railways" (79 Cong. Rec. 5651). He pointed out that the Commission is authorized to take jurisdiction over commercial zone operations when they are not regulated by the states (*ibid.*). This is in nowise inconsistent with the view of the proviso taken by the Commission. Senator Wheeler's description of the proviso is not altogether clear. He stated:

* * * "The committee has added an outright exemption of the operations of carriers of passengers in such local areas where such carriers are also lawfully engaged in the intrastate transportation of passengers over the entire length of their interstate route or routes in accordance with the laws of each State having jurisdiction."

Of course, as the history of the proviso shows, it was not added by the Committee as an exemption but was added to remove the exemption otherwise afforded.

its original findings on this point were inadequate (R. 817–819). Among the objects of the national transportation policy, as defined at the outset of the Act, *infra*, p. 56, is the purpose "to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, * * * all to the end of developing, coordinating, and preserving a national transportation system * * * adequate to meet the needs of the commerce of the United States, of the postal service, and of the national defense." It is this policy which is made a limitation on the commercial-zone exemption by Section 203 (b), and the policy is to be interpreted and applied in the present case in the context of commercial-zone transportation.

The question thus presented is a relatively simple one: whether the existence of unreasonable fares for transportation to military and naval headquarters employing over 30,000 persons is sufficient to call into play the duty of the Commission to attempt to secure reasonable charges in order that a transportation system may be preserved which is adequate to meet the needs of the national defense. If unreasonable fares to these military headquarters are not within the coverage of the policy of the Act as it applies to interstate commercial-zone transportation, it would be difficult to give meaning to the standard as it governs removal from that exemption. If the fares charged had been $1 for each trip, we suppose

that there would be no doubt of the Commission's authority to investigate and prescribe a reasonable maximum. Once the relationship between unreasonable fares and the national transportation policy is recognized, the Commission's authority to institute such an investigation necessarily follows.

It is not necessary, however, to rely on an abstract relationship. The record shows that the reasonableness of the fares has been a matter of continuing and serious concern to the responsible heads of the military establishments. The investigation itself was undertaken at the vigorous suggestion of the Secretary of War, concurred in by the Secretary of the Navy. Secretary Stimson wrote to Chairman Alldredge as follows (Ex. 7, not printed):

> I believe that * * * the present transportation charges and conditions operate to the detriment of the efficiency and well-being of War Department personnel and against the conduct of the war effort.

A subsequent letter of Secretary Stimson to the Chairman of the Commission contains the following statements (Ex. 11, R. 959):

> For many months the War Department has been seeking to obtain a reduction in the rates of fare between the District of Columbia and the Pentagon Building, the Army Air Forces Building at Gravelly Point and the Navy Annex. For months the

> Commanding General of the Washington Military District, in cooperation with the Navy Department, has sought in vain to have the transportation companies agree to a voluntary reduction in rates.
>
> The present rates are excessive, as the report of Mr. W. Y. Blanning of your Commission shows. They place an unfair financial burden on employees, most of whom work at modest salaries. Glaring inequities permeate the entire rate structure. * * *
>
> * * * I have now arrived at the point where I feel that further attempts to work out fair rates on a voluntary basis would be wasteful. Because of this and because of the War Department's vital interest in having adequate transportation facilities for its many workers and in preventing them from paying exorbitant rates, I bring this matter to the attention of the Interstate Commerce Commission.

At the hearings before the Commission, the War and Navy Departments assumed the task of showing actual dissatisfaction with the fares among civilian employees of the Military and Naval establishments. Exhibits were introduced showing a relatively high rate of separations from the service at these installations as compared with those in accessible locations in the District, and showing the importance of the fares in the light of the low wage levels of the civilian employees (Exs. 23, 34, 37, R. 970, 981, 982, 73–90, 97–101;

Exs. 21, 22, 35, 36, R. 969, 970, 981, 982, 69, 71, 99, 100); and testimony was introduced from employees and personnel supervisors showing dissatisfaction with fares and its effect on employment (R. 366–376, 376–391). The Commission in its second opinion described this evidence (R. 817–818) and declared that it "has been shown that the existing fares are having an effect detrimental to all such services, and there can be no assurance against the charging of excessive fares except by subjecting them to regulation" (R. 819). The efforts of the appellees in this aspect of the case were largely devoted to an attempt to show that dissatisfaction with fares was not an important contributing cause of the separations of civilian employees from the service. This effort was not, we submit, successful, and the Commission so concluded. But more fundamentally, the effort reflects a misconception of the Commission's responsibility and authority. The significance of reasonable rates in the national transportation policy as applied to this situation does not depend on a showing that transportation, or the national defense, is breaking down. If the maintenance of economical mass transportation service to the central headquarters of our military and naval establishments is within the purview of the national transportation policy as it qualifies the exemption of interstate transportation within a commercial zone, then the Commission properly took jurisdiction in this case.

II.

The Commission was not required to refer the investigation to a joint board.

None of the carriers maintained that the proceeding before the Commission should be referred to a Joint Board. The point was, however, raised by the Virginia Corporation Commission, as intervenor. Its motion was denied by the full Commission (R. 159–160).[6]

The pertinent provision of the Motor Carrier Act is in Section 205(a):

> (a) The Commission shall, when operations of motor carriers or brokers conducted or proposed to be conducted involve not more than three States, and the Commission may, in its discretion, when operations of motor carriers or brokers conducted or proposed to be conducted involve more than three States, refer to a joint board for appropriate proceedings thereon, any of the following matters arising in the administration of this part with respect to such operations as to which a hearing is required or in the judgment of the Commission is desirable: Applications for certificates, permits, or licenses; the suspension, change,

[6] Counsel for the Arlington Line stated in argument at the close of the hearings (R. 723) with respect to the question of a Joint Board: "Mr. Commissioner, that issue was raised at the hearing by Mr. Kepner, representing the Virginia State Corporation Commission. No one of the Respondents and no other party joined in that motion. Everybody maintained very stern silence and that was the end of it, as nobody has touched it on brief, so far as I know."

> or revocation of such certificates, permits, or licenses; applications for the approval and authorization of consolidations, mergers, and acquisitions of control or operating contracts; complaints as to violations by motor carriers or brokers of the requirements established under section 204 (a); and complaints as to rates, fares, and charges of motor carriers or the practices of brokers: *Provided, however,* That if the Commission is prevented by legal proceedings from referring a matter to a joint board, it may determine such matter as provided in section 17. The Commission, in its discretion, may also refer to a joint board any investigation and suspension proceeding or other matter not specifically mentioned above which may arise under this part. * * *

It will be observed that where, as here, the operations of the carriers involve not more than three states, the provision for a Joint Board is mandatory as to certain matters, including "complaints as to rates," but is discretionary in other matters. It seems clear that the proceeding was not instituted upon "complaint" as that term is used in the statute, but was rather an "investigation," as to which the Commission was given discretion regarding the convening of a Joint Board. The letters from the Secretary of War to the Chairman of the Commission did not have the character of a complaint in any formal or technical sense, but were at most an expression of

dissatisfaction with existing rates and a request for an investigation (see, *e. g.*, Exhibit 11, R. 959). The order instituting the proceeding recited that "an investigation be, and it is hereby instituted into and concerning the reasonableness and lawfulness otherwise of the fares of respondents * * *." (Quoted in complaint of Virginia Commission in court below, par. V, R. 879.) The hearing was described at the outset by the presiding Commissioner as "an investigation instituted at the request of the Secretary of War * * * into the reasonableness and the lawfulness" of certain interstate fares. The opinion and report of the Commission described the proceeding in the same terms (R. 836).[7] The Rules of the Commission distinguish between hearings on complaints and hearings in investigation proceedings. Rule 5 provides that in complaint cases the carriers complained of are styled defendants, while in investigation proceedings the carriers designated therein are styled respondents. The latter designation was employed in the present case (R. 2). Had this been a complaint case, it would have been necessary for the War and Navy Departments to

[7] There is no inconsistency in the ruling of the Commission that "Since this investigation was instituted at the request of the War Department * * * it is in the nature of a complaint and accordingly it is believed proper that the Department should proceed first and introduce evidence that it may have * * * to be followed by other parties who have evidence of a similar nature, and then by respondents." (R. 10.) The order of presentation was fixed to "expedite the hearing of this case." (*Ibid.*)

draw up a complaint in the nature of a pleading which might be served on the defendant carriers. See Rule 26. These modes of procedure antedated the Motor Carrier Act of 1935 and furnish the background against which the distinction in that Act between complaints and investigations on the Commission's motion is to be understood. The present proceeding was consistently and properly treated as an investigation on the Commission's own motion into the lawfulness and reasonableness of rates, and, so treated, did not require the convening of a Joint Board.

III

The order is not unlawful because it relates in part to the electric lines of the Transit Company

The transportation here involved is conducted entirely by buses so far as the traffic across the Potomac is concerned. Those buses are operated by the Transit Company and the four Virginia Lines. The order does, however, establish fares for the entire interstate transportation, including transportation between points in the District and the bus terminals on the District side, whether by buses or street railways of the Transit Company. Objection has been raised to the order because of its coverage of the street railway transportation as part of the interstate transit.

The Transit Company is not exempted from the provisions of the Motor Carrier Act because of the fact that it operates street railways as well

as buses. Section 203 (a) (14) defines common carrier by motor vehicle to include such motor vehicle operations by common carriers generally. Cf. *Thomson* v. *United States,* 321 U. S. 19, 23–24. Nor is the Commission precluded from exercising authority over electric street railways under the aggregate of its powers conferred by the Interstate Commerce Act. It is true that in a number of particulars that Act excludes certain electric railways from the authority of the Commission; but aside from these, the general jurisdiction of the Commission over common carriers by railroad extends to carriage by electric street railways. In *United States* v. *Village of Hubbard,* 266 U. S. 474, 479–480, Mr. Justice Brandeis enumerated the provisions excluding electric railways and observed that the Transportation Act, 1920, "provided expressly in five sections for the exclusion of certain electric railways from the operation of the powers conferred; and it also differentiated interurban electric railways from street and suburban railways by specific reference to each, although a distinction in treatment was made in only one case." In its report on the bill which became the Motor Carrier Act, the Senate Committee on Interstate Commerce stated (S. Rep. 482, 74th Cong., 1st sess., p. 2): "the Interstate Commerce Act which the Commission administers now applies to steam railroads, electric railways, express companies, sleeping-car companies, pipe

lines, and steamship lines controlled by railroads, and to the joint operations of rail and water lines." Electric railways are not excluded from the authority of the Commission with respect to reasonable rates and charges. The exclusions relate to through routes, construction, extension, and abandonments, issuance of securities, the guarantee to carriers after federal control, and the jurisdiction of the Railway Labor Board.[8] 266 U. S. at 479–480. There is thus no warrant for blanket exclusion of the electric railway operations of the Transit Company from the proceedings here in question.

The issue is a narrower one. It has to do with the provisions of the Motor Carrier Act concerning through routes and joint fares. The Act permits, but does not require, motor carriers to establish through routes and joint fares with

---

[8] The exclusion of electric lines from Section 15a, relating to fair return, adverted to in the *Village of Hubbard* case, *supra*, was eliminated in 1933. 48 Stat. 220.

See 2 Sharfman, *The Interstate Commerce Commission* (1931), pp. 15–17:

> The Commission's sweeping jurisdiction over electrics as thus exerted is based not only upon the generality of the language of the original Act in naming the common carriers to which it applies, but also upon the implications contained in subsequent amendments of its substantive provisions. * * * The Commission has uniformly construed these restrictions as limited to the special powers involved, and hence as strengthening rather than weakening the validity of its exercise of general jurisdiction over electric roads engaged in interstate commerce. In this attitude the Commission has received the full support of the courts. * * *

other types of carriers. Section 216 (e).[9] It does, however, empower the Commission, whenever deemed by it to be necessary or desirable in the public interest, to prescribe through routes and joint fares for passenger motor carriers; the Commission may (*ibid.*):

> * * * establish through routes and joint rates, fares, charges, regulations, or practices, applicable to the transportation of passengers by common carriers by motor vehicle, or the maxima or minima, or maxima and minima, to be charged, and the terms and conditions under which such through routes shall be operated: * * *

So far as transportation solely by the Transit Company is concerned, no question is presented of thorugh routes or joint fares. The issue thus concerns only the requirement of through routes and maximum joint fares between the Virginia Lines and the Transit Company to the extent that part of the operations of the latter are carried on by street railways.

It is important to mark the delimitation of the issue. The Commission has not prescribed a through rate and joint fares between a bus company and a street railway; as would have been true if the Transit Company was wholly of the latter character. Nor has the Commission required a carrier having both buses and street

[9] See 79 Cong. Rec. 5655, 5670 (explanation by Senator Wheeler).

railways to include its street railways in a through route and joint fares when its railway operations had been quite separate from its bus operations. The Commission has simply required, as an incident to the prescription of through routes and joint fares between the buses of the Virginia Lines and those of the Transit Company, that the Transit Company continue to treat its street railway and its bus operations indiscriminately with respect to these routes and fares as long as that treatment continues with respect to the remainder of its operations. Thus under the order, if a passenger from the Pentagon travels on a Virginia Line bus to its District terminal, and there boards a Transit Company bus, he is entitled to a transfer to a Transit Company street car in accordance with the normal practice of the company. Similarly, the order entitles a passenger to transfer directly from a Virginia Line bus to a Transit Company street car, without boarding an intermediate Transit Company bus, since under the company's practice, bus and street car transportation are interchangeable. To have permitted the Transit Company to alter this practice with sole reference to passengers traveling between the District and the Virginia installations would have been to frustrate the admitted authority of the Commission to establish through routes and joint fares for the bus transportation of the Virginia Lines and the Transit Company.

The Commission's order in this regard was, we submit, fully warranted under principles long recognized and frequently applied by this Court in similar cases. In *Houston & Texas Ry.* v. *United States,* 234 U. S. 342, it was argued that the authority of the Commission to deal with discriminations against persons or localities did not include the power to disapprove intrastate rates fixed by a state commission; this Court rejected the argument, despite the express proviso in the Act that it should not apply to transportation wholly within a state. See also *Wisconsin R. R. Comm.* v. *Chicago, B. & Q. R. R. Co.,* 257 U. S. 563. In *California* v. *United States,* 320 U. S. 577, it was argued that the authority of the Maritime Commission to prescribe just and reasonable regulations and practices for wharfingers did not include the power to fix minimum rates; this Court rejected the argument, despite the fact that the statute conferred rate-making power over water carriers and not over wharfingers. In *United States* v. *Pennsylvania R. R.,* Nos. 47 and 48, present Term, it was argued that the authority to prescribe through routes between railroads and water carriers did not include authority to require interchange of cars between them; this Court rejected the argument, despite the fact that the Act imposes specific obligations as to car interchanges only among railroads. In each case the statute was construed and applied to make effective a granted power.

So here, the grant of power to require through routes and joint rates between motor carriers draws with it the power to require that street railway service be interchangeable with bus service in relation to the through routes while it continues to be so interchangeable on the rest of the operations of the Company. This was, in fact, at the basis of the Commission's order in this regard. The Commission stated (R. 842):

> The Transit Company is not now, although it may have been in the past, a street electric passenger railway in the usual sense of that term. It conducts bus operations throughout the District and in adjacent territory. The total mileage operated by its busses and street cars is about the same. These operations are commingled and blended. A uniform fare applies to both and transfers are interchangeable between street cars and busses. About 62 percent of the gross revenues of this company is derived from streetcar operations and 38 percent from bus transportation.
>
> In view of the circumstances described, effective exercise of the authority expressly conferred upon us to regulate the bus fares necessarily involves some regulation of the Transit Company's streetcar fares insofar as they apply to the transportation considered. The situation is analogous to the relation between intrastate and interstate railroad traffic, concerning which the Supreme Court in *Wisconsin Railroad Com-*

mission v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, said (p. 588):

> "Effective control of the one must embrace some control over the other in view of the blending of both in actual operation. The same rails and the same cars carry both. The same men conduct them."

Accordingly, we hold that we have jurisdiction to require the application of the fares herein found reasonable to the combined bus-streetcar operations of the Transit Company and to those operations and the bus operations of the Virginia Lines.

It should be added, finally, that the order in this respect is further supported by the provision of Section 216 (e), *supra*, which empowers the Commission specifically to establish "regulations or practices" applicable to transportation of passengers by motor vehicle, and "the terms and conditions under which such through routes shall be operated." Cf. *California* v. *United States*, *supra*; *United States* v. *New York Central R. R.*, 272 U. S. 457, 464.

There is no warrant for the objection, raised below, that the Commission has in effect undertaken to regulate intrastate fares in contravention of the concluding clause of Section 216 (e), which reads: "*Provided, however,* That nothing in this part shall empower the Commission to prescribe, or in any manner regulate, the rate, fare, or charge for intrastate transportation, or for any service connected therewith, for the purpose of removing

discrimination against interstate commerce or for any other purpose whatever." The only rates regulated by the present order are those in interstate commerce. The fact that the fares are prescribed for passengers who may change from one carrier to another in the District in the course of their interstate trip does not, of course, convert any segment of the transportation into intrastate commerce. *Baltimore & Ohio S. W. R. R. Co.* v. *Settle*, 260 U. S. 166, 171.[10]

Nor is there warrant for the objection that the Commission failed to make the requisite finding of public interest for the establishment of through routes and joint fares. The Commission found that "joint fares on this traffic interchanged between the Transit Company and the Virginia Lines are necessary and desirable in the public interest." (R. 850.) Through routes in a practical sense were in effect; the Commission's order did not prescribe changes in routes or facilities; what it prescribed was, essentially, joint rates. These necessarily require through routes. Cf. *Through Routes and Through Rates*, 12 I. C. C. 163, 165; *St. Louis Southwestern Ry. Co.* v. *United States*, 245 U. S. 136, 139, n. 2. Hence the finding

[10] Reliance by the Commission on the principle of construction applied in the *Chicago, B. & Q. case*, 257 U. S. 563, in no sense indicates a regulation of intrastate commerce; the situation here as between the buses and electric line was said by the Commission to be "analogous to" that as between intrastate and interstate commerce in the former case (R. 842).

of the Commission as to the necessity and desirability of joint rates was entirely adequate.

IV

The order is not unlawful as a prescription of commutation fares.

In the court below appellees argued that certain of the fares prescribed are commutation fares, and that the Commission is without authority to establish such fares. The argument rests on Section 22 of Part I of the Act, made applicable to motor carriers by Section 217 (b). Section 22 enumerates a number of classes of fare reductions and gives assurance that these are not to be treated as unlawfully discriminatory *per se*. This is evident from the form of the section, which reads "that nothing in this part shall prevent * * * the issuance of * * * commutation passenger tickets."[11] The Commission in its second opinion discussed the question fully (R. 822–825) and concluded that the fares prescribed are not commutation fares, and that in any event the Commission does not lack authority to require such fares. These conclusions are, it is submitted, sound.

So far as the Transit Company is concerned, the order prescribes nothing which could be re-

[11] In this form the provision dates from 1889. In the original Act of 1887, it had read "that nothing in this act shall apply to * * *." The change emphasizes the purpose of the provision as simply not to "prevent" absolutely the enumerated types of differentials.

garded as a commutation ticket. The order simply provides that the existing fares shall apply to the transportation here involved. With respect to the Virginia Lines, the order provides for the sale of three tokens for 25 cents or a cash fare of 10 cents. The provision for tokens is a normal feature of such fare schedules and does not have the characteristics of a commutation fare. The provision for the sale of tokens or ticket books, valid for 60 days, good for 12 trips at a total cost of $1.60, is likewise not the establishment of a commutation fare. It constitutes the sole joint fare for the interline transportation. Moreover, as the Commission pointed out, commutation service and fares ordinarily connote suburban and interurban transportation, whereas that here under consideration is essentially urban in character. The token and ticket fares here prescribed are the normal fares for the service which is essentially regular urban transportation.

In any event, the Commission is not forbidden by Section 22 of the Act to require commutation fares. The purpose of the section was clearly explained in *Nashville, C. & St. L. Ry. Co.* v. *Tennessee,* 262 U. S. 318, which involved a cognate provision of Section 22 stating "that nothing in this act shall prevent the carriage, storage, or handling of property free or at reduced rates for

the United States, State, or municipal governments, or for charitable purposes * * *." There the state had fixed relatively low rates for shipments to local authorities. The Interstate Commerce Commission found discrimination, and ordered these rates increased to the level of other rates. This Court sustained the action of the Commission, despite section 22, and thus described the purpose of that section (p. 323):

> The object of the section was to settle, beyond doubt, that the preferential treatment of certain classes of shippers and travelers, in the matters therein recited is not necessarily prohibited * * * Only in this sense can it be said that the section is permissive. It confers no right upon any shipper or traveler. Nor does it confer any new right upon the carrier.

If in the *Nashville* case Section 22 was held not to preclude the Commission from prohibiting reduced rates, despite the language of the section that nothing in the Act "shall prevent" such reduced rates, surely it is even clearer that the section does not preclude the Commission from finding that this type of rate is required in the interest of reasonable charges and service. The argument to the contrary appears to stem from *Lake Shore & Michigan Southern Railway Co.* v. *Smith*, 173 U. S. 684, in which this Court held that a state could not validly prescribe a flat rate for

mileage tickets lower than the max mum rates prescribed by law as reasonable. Not only did that case involve a question under the Fourteenth Amendment rather than under the provisions of the Interstate Commerce Act, and involve a requirement of mileage tickets rather than commutation fares, but it has been discredited by subsequent decisions. In *Arkadelphia Co.* v. *St. Louis S. W. Ry. Co.*, 249 U. S. 134, 149, the Court said, "The authority of that case is not to be extended." And in *Interstate Railway Co.* v. *Massachusetts*, 207 U. S. 79, a state law was upheld which fixed special rates for school children.

The Commission has never doubted its authority to prescribe reasonable commutation fares where the carrier itself has instituted such fares. See the cases cited in the Commission's opinion (R. 824–825). While the Commission has at times indulged in dicta doubting its authority to inaugurate such fares, those expressions are unwarranted by the terms of the Act, as the Commission now recognizes. As was said in *Houston & Texas Ry.* v. *United States*, 234 U. S. 342, 359: "It is urged that the practical construction of the statute has been the other way. But, in assailing the order, the appellants ask us to override the construction which has been given to the statute by the authority charged with its execution, and it cannot be said that the earlier action of the Commission

was of such a controlling character as to preclude it from giving effect to the law." [12]

V

The rates prescribed are not arbitrary or confiscatory

In large part, the maximum rates prescribed by the Commission follow the unofficial recommendations contained in a report (the so-called Blanning Report) prepared by the Director of the Bureau of Motor Carriers of the Commission for a committee of the Office of Defense Transportation. These recommendations were acceptable to the appellees but were rejected by the War Department on the ground that the savings in transportation costs thereunder would be too slight (R. 847; see p. 4, *supra*).[13] The rates there recommended were basically a through rate of 13⅓ cents (12 tickets for $1.60) for through transportation between the Virginia installations and any point in the

[12] There is nothing to the contrary in *United States* v. *New York Central Railroad*, 263 U. S. 603. There the Court, construing an Act of 1922 relating to mileage tickets, held that the Act was not meant to require or encourage the Commission to prescribe the use of such tickets, and that the Commission should have exercised its ordinary discretion in determining whether to require such fares.

[13] In expressing willingness to accept those recommendations the appellees did not concede their reasonableness (R. 1013). At the close of the hearings, however, counsel for the Alexandria and for the Arlington Lines reaffirmed their willingness to accept the Blanning recommendations (R. 720, 724).

District, including interline transportation. The Commission adopted the same rate as the applicable joint rate. The Commission likewise permitted the lower rates charged for particular trans-Potomac routes to be raised to the level of 8⅓ cents (three tokens for 25 cents), or 10 cents per single trip (R. 851). The Commission required, however, that the transportation furnished by the Transit Company, not in combination with the Virginia Lines, should be afforded at the rates prevailing for the company's transportation in the District (three tokens for 25 cents, an unlimited weekly pass at $1.25; and single trips at 10 cents).

In supporting its order with respect to the Transit Company fare, the Commission pointed to the evidence showing that the company maintains a zone fare in the District, that the Virginia installations are essentially part of the business community of the District, and that the average one-way distance traveled by employees at the Pentagon and the Army Annex from their residences in the District to those installations is 6.2 miles, which is "considerably less than one-half the maximum distance over which a passenger may travel for one fare within the District, and compares favorably with the distances from a number of selected points within the District to various military establishments in the District where military personnel and civilian employees of the Department are assigned to duty" (R.

844).[14] The differential in fare between the unitary Capital Transit transportation and the interline transportation under the Commission's order simply continues a differential which had previously existed at a somewhat higher level. The Commission's order removes a number of inequalities growing out of special fares. The War and Navy Departments did not appeal from the Commission's order, and no passengers are attacking it on the ground of discrimination. The order, if affirmed, will protect the carriers against claims of that character. *Arizona Grocery Company* v. *Atchison, T. & S. F. Ry.*, 284 U. S. 370. If complaint should be made on that score in the future, the Commission can make any necessary adjustments. Here it need be said only that differentials between one-line and two-line hauls are not uncommon, and their adoption by the Commission is properly a matter within its "exercise of administrative discretion." *Georgia Pub. Serv. Comm'n* v. *United States*, 283 U. S. 765, 774–775; *Illinois Commerce Comm'n* v. *United States*, 292 U. S. 474, 476–477.

In the court below the appellees, particularly the Transit Company, asserted that the rates are

[14] The average distance traveled by Pentagon employees is based on information obtained from questionnaires returned by 9,500 employees (R. 47, 961). For representative distances between the Virginia installations and War Department establishments in the District, on the one hand, and residential points in the District, on the other, see Exhibit 12, R. 960.

confiscatory. Evidence of the aggregate earnings of each company, offered by the War and Navy Departments, was rejected by the Commission on objection strenuously urged by the carriers (see R. 848).[15] The evidence considered by the Commission was confined to the operations for which the rates are prescribed in the present order. This approach was taken presumably under the authority of *Northern Pacific Railway* v. *North Dakota*, 236 U. S. 585, 604, which held that a state may not validly prescribe a confiscatory rate for a particular class of traffic with the sole justification that the aggregate earnings of the carrier yield a fair return. Whatever may be the limits of that decision, at all events it requires the carrier to show confiscation with respect to "the entire traffic to which the rate applies" (236 U. S. at 604). This the appellees wholly failed to do.

Only the Transit Company introduced any cost evidence. That evidence related to the cost of service on the Company's Pentagon lines between their District terminals and the Pentagon during the first seven months of 1943, and purported to

[15] For objections and rulings, see R. 111–117, 137, 148–149. Exhibits 84–87, 96 (not printed), ruled immaterial, show rate of return for each appellee at present and after application of fare reduction to District level. Before war taxes, returns range from 13 to 96 percent; after all taxes, from 8.6 to 31 per cent. Suggested fare reduction (greater than ordered) would produce returns from 12.7 to 91.1 per cent before war taxes. Rate base is historical cost less depreciation, plus net additions (taken from reports of the appropriate commission). See R. 207–210, 211–237.

show that the cost per passenger was 5.39 cents. (Exhibit 89, R. 1022, 338.) This figure was contradicted by evidence on behalf of the Departments showing that the cost per passenger of the operations on the Pentagon lines independently was only 3.57 cents (Exhibit 101, R. 1040–1041, 634). The computations are subject to the infirmities incident to any effort to make an allocation of joint costs, and the allocations reflect a relatively high cost figure for the Pentagon lines based on their short daily period of operation. (R. 349, 413.) The Commission stated that the cost of this independent operation "per passenger very closely approximates five cents" (R. 845). But, as the Commission emphasized, "the cost of operation of these lines is only a portion of the cost of the through operation here considered. Since the traffic originates or terminates on practically every bus or streetcar line operated in the District the cost are merged with those of the District operations and may not properly be considered as those of an independent operation." (R. 846.)

The argument of the Transit Company rests on an obvious fallacy. The Company argued in the court below that since the cost of the Pentagon service was found to be approximately 5 cents, the rate prescribed was necessarily confiscatory, since no additional fare was allowed beyond the District fare, and the District fare must be assumed to be no more than compensatory for the District

operations. The fallacy lies in the failure to take as the unit of cost the entire transportation between places of residence in the District and the Virginia installations. It is this unit for which fares have been prescribed, and evidence as to the cost of a segment thereof is inconclusive. The Transit Company makes no showing that a fare of 8⅓ cents for the average trip of 6.2 miles is confiscatory. On the contrary, there is abundant evidence showing that it is not. The distance involved, as has been stated, is less than half the maximum distance covered by the zone fare within the District. A War Department consultant, who operates a suburban bus line in the Philadelphia area, testified that a fare of 1¼ cents per mile was reasonable for this type of transportation (R. 238, 241–243, 254). An expert witness for the War Department computed the cost per passenger between the Pentagon and destination as 7.06 cents, which can be corrected on the basis of adjustments indicated by a company witness to 7.8 cents (Exhibit 102; R. 1041; see R. 665–666, 693).[18]

[18] Exhibit 102, containing the figure 7.06 cents, is a Department exhibit based partly on Exhibit 101, which computes the cost per passenger for the Pentagon bus operation alone at 3.57 cents (R. 1040–1041). The latter figure is arrived at by a computation of running expenses per mile and fixed expenses per hour of operation, the basic data being taken from company figures. (See R. 635–637.) The correction referred to was made because the Department study had omitted in its figures for hours of operation the running time between the Pentagon and storage point of the buses, in both directions. With the addition of these hours, the company wit-

Finally, two additional factors cannot be ignored. One is that a fare on a substantial part of the Transit Company's Pentagon operations has been increased, namely, the fare for passengers traveling exclusively on its so-called R–2 (Memorial Bridge) lines without transfers, a distance of 3.5 miles; this fare was previously 5 cents and may be raised under the order to the level of the District fare. The other factor is that the Transit Company will be entitled, of course, to divisions of the joint rate with the Virginia Lines; and there is no warrant whatever for supposing either that the 13⅓-cent joint fare is confiscatory or that appropriate divisions of that fare will not be amply compensatory to the Transit Company with respect to the distance within the District served by it as part of the through routes with the Virginia Lines.[17]

---

ness computed Exhibit 101 to reach 4.36 cents, or about .8 cent above the 3.57 cents shown on Exhibit 101 for the separate Pentagon passenger-trip. (R. 665–666.) The witness brought the cost to 5 cents for this operation upon the addition of a return of 7 per cent on investment. (R. 666.)

The figure 7.8 cents is computed by adding to 7.06, shown in Exhibit 102 for the through trip, the increase of approximately .8 supplied by the company witness.

[17] It appears that over 11 per cent of those who have used the Transit Company facilities alone (not in combination with a Virginia Line) to the Pentagon have paid only a 5-cent fare; see Ex. 18, R. 965; cf. Ex. 19, R. 966–967 (first horizontal line). This fare may be raised under the order. And it appears that of the more than 9,000 passenger trips per day on the trans-Potomac Virginia Lines, the great ma-

The entire case is one plainly falling within the rule announced by this Court in *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 53:

> * * * The established principle which guides the court in the exercise of its judgment on the entire case is that the complaining party carries the burden of making a convincing showing, and that the court will not interfere with the exercise of the rate-making power unless confiscation is clearly established. * * *

CONCLUSION

For the reasons stated the judgment below should be reversed and the order of the Commission affirmed.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

PAUL A. FREUND,
Special Assistant to the Attorney General.

APRIL 1945.

---

jority constitute interline transportation involving the Transit Company's District facilities; see Ex. 19, R. 966-967, lines 1(b)–1(e). The Transit Company will receive a division of the 13⅓-cent fare prescribed for this through service.

APPENDIX

The Motor Carrier Act, 1935, c. 498, 49 Stat. 543, as amended:

SEC. 203 (a). As used in this part—

* * * * * *

(14) The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part I.

* * * * * *

(16) The term "motor carrier" includes both a common carrier by motor vehicle and a contract carrier by motor vehicle.

* * * * * *

SEC. 203 (b). Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include (1) motor vehicles employed solely in transporting school children and teachers to or from school; * * * or (7a) * * * nor, un-

less and to the extent that the Commission shall from time to time find that such application is necessary to carry out the national transportation policy declared in this Act, shall the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment apply to: (8) The transportation of passengers or property in interstate or foreign commerce wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities, except when such transportation is under a common control, management, or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone, and provided that the motor carrier engaged in such transportation of passengers over regular or irregular route or routes in interstate commerce is also lawfully engaged in the intrastate transportation of passengers over the entire length of such interstate route or routes in accordance with the laws of each State having jurisdiction; * * *

SEC. 205 (a). The Commission shall, when operations of motor carriers or brokers conducted or proposed to be conducted involve not more than three States, and the Commission may, in its discretion, when operations of motor carriers or brokers conducted or proposed to be conducted involve more than three States, refer to a joint board for appropriate proceedings thereon, any of the following matters arising in the administration of this part with respect to such operations as to which a hearing is required or in the judgment of the Commis-

sion is desirable: Applications for certificates, permits, or licenses; the suspension, change, or revocation of such certificates, permits, or licenses; applications for the approval and authorization of consolidations, mergers, and acquisitions of control or operating contracts; complaints as to violations by motor carriers or brokers of the requirements established under section 204 (a); and complaints as to rates, fares, and charges of motor carriers or the practices of brokers: *Provided, however,* That if the Commission is prevented by legal proceedings from referring a matter to a joint board, it may determine such matter as provided in section 17. The Commission, in its discretion, may also refer to a joint board any investigation and suspension proceeding or other matter not specifically mentioned above, which may arise under this part. The joint board to which any such matter is referred shall be composed solely of one member from each State within which the motor-carrier or brokearge operations involved in such matter are or are proposed to be conducted: *Provided,* That the Commission may designate an examiner or examiners to advise with and assist the joint board under such rules and regulations as it may prescribe. In acting upon matters so referred, joint boards shall be vested with the same rights, duties, powers, and jurisdiction as are hereinbefore vested in members or examiners of the Commission to whom a matter is referred for hearing and the recommendation of an appropriate order thereon: *Provided, however,* That a joint board may, in its discretion, report to the Commission its conclusions upon the evidence received, if any, without a recommended order. Orders recommended by joint boards shall be filed with the Commis-

sion, and shall become orders of the Commission and become effective in the same manner, and shall be subject to the same procedure, as provided in the case of orders recommended by members or examiners under section 17. If a joint board to which any matter has been referred shall report its conclusions upon the evidence without a recommended order, such matter shall thereupon be decided by the Commission, giving such weight to such conclusions as in its judgment the evidence may justify.

SEC. 216 (a). It shall be the duty of every common carrier of passengers by motor vehicle to establish reasonable through routes with other such common carriers and to provide safe and adequate service, equipment, and facilities for the transportation of passengers in interstate or foreign commerce; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable regulations and practices relating thereto, and to the issuance, form, and substance of tickets, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the transportation of passengers in interstate or foreign commerce; and in case of such joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers.

SEC. 216 (c). Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common carriers by rail-

road and/or express, and/or water; and common carriers of passengers by motor vehicle may establish reasonable through routes and joint rates, fares, or charges with common carriers by railroad and/or water. In case of such joint rates, fares, or charges it shall be the duty of the carriers parties thereto to establish just and reasonable regulations and practices in connection therewith, and just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers.

SEC. 216 (e). Any person, State board, organization, or body politic may make complaint in writing to the Commission that any such rate, fare, charge, classification, rule, regulation, or practice, in effect or proposed to be put into effect, is or will be in violation of this section or of section 217. Whenever, after hearing, upon complaint or in an investigation on its own initiative, the Commission shall be of the opinion that any individual or joint rate, fare, or charge, demanded, charged, or collected by any common carrier or carriers by motor vehicle or by any common carrier or carriers by motor vehicle in conjunction with any common carrier or carriers by railroad and/or express, and/or water for transportation in interstate or foreign commerce, or any classification, rule, regulation, or practice whatsoever of such carrier or carriers affecting such rate, fare, or charge or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial, it shall determine and prescribe the lawful rate, fare, or charge or the maximum or minimum, or

maximum and minimum rate, fare, or charge thereafter to be observed, or the lawful classification, rule, regulation, or practice thereafter to be made effective and the Commission shall, whenever deemed by it to be necessary or desirable in the public interest, after hearing, upon complaint or upon its own initiative without a complaint, establish through routes and joint rates, fares, charges, regulations, or practices, applicable to the transportation of passengers by common carriers by motor vehicle, or the maxima or minima, or maxima and minima, to be charged, and the terms and conditions under which such through routes shall be operated: *Provided, however,* That nothing in this part shall empower the Commission to prescribe, or in any manner regulate, the rate, fare, or charge for intrastate transportation, or for any service connected therewith, for the purpose of removing discrimination against interstate commerce or for any other purpose whatever.

SEC. 216 (f). Whenever, after hearing, upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation in interstate or foreign commerce of passengers or property by common carriers by motor vehicle or by such carriers in conjunction with common carriers by railroad and/or express, and/or water, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the sev-

eral carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. The order of the Commission may require the adjustment of divisions between the carriers, in accordance with the order, from the date of filing the complaint or entry of order of investigation or such other date subsequent as the Commission finds justified and, in the case of joint rates prescribed by the Commission, the order as to divisions may be made effective as a part of the original order.

Act of September 18, 1940, 54 Stat. 899:

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable

working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 22, Interstate Commerce Act:

That nothing in this part shall prevent the carriage, storage, or handling of property free or at reduced rates, for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the transportation of persons for the United States Government free or at reduced rates, or the issuance of mileage, excursion, or commutation passenger tickets; * * *

U. S. GOVERNMENT PRINTING OFFICE: 1949